



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HCC NO. 277 OF 2008**

**UNILITE CABLES & RETREADING  
LTD.....PLAINTIFF**

**VERSUS**

**HUSSEIN DAIRY LTD & 3  
OTHERS.....DEFENDANTS**

**R U L I N G**

1. By a notice of motion filed on 17<sup>th</sup> June, 2011 the plaintiff/applicant seeks summary judgment against the defendants jointly and severally for the sum of Kshs. 23,351,165.08. The amount is claimed to be the balance due and owing in respect of goods sold and delivered by the plaintiff to the defendants at the request and instance of the defendants. The plaintiff further relies on cheques drawn by the defendants in favour of the plaintiff which cheques were dishonoured. The cheques were issued in part payment of the claim. The dishonoured cheques were returned to the defendants who issued replacement cheques which were annexed to the supporting affidavit. The defendants further all signed a guarantee binding themselves to pay the sum of Kshs. 23,351,165.08. It is therefore maintained that the defence raised by the defendant is a sham and only intended to delay the determination of the plaintiff's claim. The application is supported by an affidavit sworn by Mohamed Ali a director of the plaintiff.

2. The respondents did not file any reply to the application. However, during the hearing of the application counsel for the respondents opposed the application pointing out that the respondents had filed a defence to the plaintiff's claim way back on 3<sup>rd</sup> November, 2008. He argued that under Order 36 Rule 1 of the Civil Procedure Rules 2010, an application for summary judgment can only be made before a defence is filed. Counsel submitted that the defence filed raises bona fide triable issues, such as the statement of accounts, and a need to account for sale of previous securities. He submitted that the cheques issued were a nullity, and therefore urged the court to dismiss the application.

3. I have given due consideration to this application.

Order 36 Rule 1 (1) of the Civil Procedure Rules 2010 states as follows:

***“In all suits where plaintiffs seeks judgment for***

***(a) a liquidated demand with or without interest; or***

***(b) .....***

***where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed or part thereof and interest or recovery of the land and rent or mesne profits.”***

As is evident from the underlined portion this rule is a departure from Order XXXV of the former edition of the Civil Procedure Rules which did not have the underlined words. The effect of the words now introduced in Order 36 Rule 1 of the Civil Procedure rules 2010, is that an application for summary judgment can only be made before a defence is filed. The plaintiff’s argument that the plaintiff’s suit having been filed before the Civil Procedure Rules 2010, came into effect, cannot hold as the application for summary judgment has been made under the Civil Procedure Rules 2010. In any event, if the defendant truly did not have a defence to the plaintiff’s suit then there was no need for the plaintiff to wait for almost 3 years after the pleadings were closed before bringing the application for summary judgment. That delay which is inordinate has not been explained. There is therefore no good reason to shut out the defendant at this late stage.

I find that the application is not maintainable under Order 36 Rule 1 of the Civil Procedure Rules 2010. The same is accordingly rejected.

**Dated, signed and delivered this 31<sup>st</sup> day of October, 2011**

**H. M. OKWENGU**  
**JUDGE**

In the presence of:  
Lijodi for the Plaintiff  
Sitonik for the Defendant  
Kiponda Court Clerk